EXXON CORP.

IBLA 85-564 Decided January 13, 1987

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, holding that Exxon Corporation, as lessee of record of oil and gas leases, is responsible for assessments for noncompliance imposed upon its designated operator. W-37277A, W-37655A.

Reversed.

1. Notice: Generally -- Oil and Gas Leases: Generally -- Regulations: Generally

   The Department is obligated to mail a copy of orders, instructions, or notices to the lessee of record under 43 CFR 3162.3 when such documents are served upon the operator designated by the lessee to engage in the actual conduct of operations on the leasehold.

2. Oil and Gas Leases: Generally -- Oil and Gas Leases: Civil Assessments and Penalties -- Regulations: Generally

   Where 43 CFR 3163.3(a) is amended to reduce assessments to a one-time, rather than a continuing charge, the amended regulation will be applied to the benefit of the affected party, absent any intervening rights which will be affected or countervailing public policy reasons.

APPEARANCES: John C. Backus, Esq., Denver, Colorado, for appellant; Lowell L. Madsen, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Exxon Corporation (Exxon) appeals from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated March 21, 1985, which held that Exxon, as lessee of record of oil and gas leases W-37277A and W-37655A in Sweetwater County, Wyoming, was responsible for an assessment for noncompliance amounting to $ 4,750 imposed upon Catamount Exploration (Catamount), Exxon's designated operator for those leases. In 1982, Exxon and Devon Energy Corporation (holder of a 25-percent operating interest) designated Catamount as the operator of certain lands covered by the leases. The designation was made on BLM form 9-1123 "Designation of Operator" and was filed with and accepted by BLM.

By letter dated July 12, 1983, BLM notified Catamount that inspection of the lease properties had indicated that, in accordance with 43 CFR 3162.1, 1/ additional rehabilitation work was needed, both at the wellsites (the Salt-Federal Well No. 16-14 on W-37277A and the Salt-Federal Well No. 21-6 on W-37655A) and on the access road to the two wellsites, and if the work was not completed by September 1, 1983, Catamount would be subject to assessments as provided by 30 CFR 221.52(a). 2/ The rehabilitation work was not performed, and by letter dated September 16, 1983, Catamount was notified that starting September 1, 1983, an amount of $ 250 per day was being assessed until compliance was achieved and approved. BLM and Catamount personnel met and discussed the situation on September 26, 1983, and by certified letter dated October 14, 1983, BLM notified Catamount that $ 250 per day was being assessed for 19 days of noncompliance, for a total of $ 4,750, pursuant to 30 CFR 221.52(a). That letter also notified Catamount that it had the right to a technical and procedural review of BLM's assessment decision, and that a request for such review had to be submitted within 10 working days of Catamount's receipt of the letter.

BLM did not send Exxon copies of any of the above-noted letters, nor was Exxon notified of the September 26, 1983, meeting. Exxon asserts that it was unaware of problems with the Salt-Federal Well Nos. 16-14 and 21-6 until October 9, 1984, when a BLM employee called Exxon's Denver office, informing Exxon that it would be responsible for the assessment if Catamount did not pay it. Additionally, at that time Exxon was informed that the wellhead on well No. 21-6 was leaking gas and that Exxon was responsible for repairing it.

By letter to Exxon, dated October 24, 1984, BLM confirmed the substance of the October 9, 1984, telephone conversation. Subsequently, Exxon filed a request with the BLM Wyoming State Director for technical and procedural review of the assessment. Exxon argued that it could not be held responsible for the noncompliance assessment because BLM failed to send copies of its notices, instructions, and assessment decision to Exxon as required by 43 CFR 3162.3. The decision rejecting that argument is under appeal in this case.

In its statement of reasons, Exxon states that well No. 21-6 has been shut-in and is no longer leaking, BLM having given Exxon permission to plug and abandon the well in the spring of 1985. Further, Exxon stated that it planned to perform the work necessary to rehabilitate the access roads, drill

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1/ This regulation provides as follows:

"§ 3162.1 General requirements.

"The lessee shall comply with applicable laws and regulations; with the lease terms, Onshore Oil and Gas Orders, NTL's; and with other orders and instructions of the authorized officer. These include, but are not limited to, conducting all operations in a manner which ensures the proper handling, measurement, disposition, and site security of leasehold production; which protects other natural resources and environmental quality; which protects life and property; and which results in maximum ultimate economic recovery of oil and gas with minimum waste and with minimum adverse effect on ultimate recovery of other mineral resources."

2/ 30 CFR 221.52(a) was redesignated as 43 CFR 3163.3, effective Aug. 12, 1983. 48 FR 36583 (Aug. 12, 1983).

pads, and pits at both wells in order to comply with applicable regulations. However, it reiterates its argument that it is not responsible for the noncompliance assessment because of BLM's failure to provide it notice, as required by 43 CFR 3162.3.

Our resolution of the appeal rests upon our interpretation of 43 CFR 3162.3, which provides in its entirety:

> § 3162.3 Conduct of operations.
>
> (a) Leasehold operations shall be conducted by the lessee or its designees. The lessee may authorize the actual conduct of operations in its behalf by designating another party as operator in a manner and form acceptable to the authorized officer. Acceptance of an executed designation as authority for the designee to act for the lessee in matters relating to the conduct of lease operations does not relieve the lessee from the ultimate responsibility for compliance with applicable laws, regulations, lease terms, Onshore Oil and Gas Orders, NTL's, and the orders and instructions of the authorized officer. Lessees shall notify the authorized officer in writing when a designation of operator has been canceled. A designated operator cannot designate a different party as operator.
>
> (b) The contractor or other person in charge of or conducting operations on a leasehold will be considered the agent of the lessee for such operations with full responsibility for acting on behalf of the lessee insofar as complying with applicable laws, regulations, the lease terms, NTL's, Onshore Oil and Gas Orders, and other orders and instructions of the authorized officer. The serving of orders, instructions, or notices on the contractor or other person in charge of conducting such operations on a leasehold, when delivered personally or by ordinary mail, will be deemed to be service upon the lessee. When served in this manner, a copy will be mailed to the lessee and the designated operator at their address of record. [Emphasis added.]

Exxon argued, in its request for technical and procedural review, that the last sentence of subsection (b), just quoted, embodies the logical requirement that a copy of orders, instructions, or notices served on the designated operator be mailed to the lessee of record. Exxon asserted that the requirement is "fair," since it functions to make the lessee aware of the problem at the earliest opportunity, which enables the lessee to persuade the operator to undertake remedial action. However, Exxon argued that because it was not apprised of Catamount's noncompliance until over a year after the first BLM notice was given to Catamount, Exxon was given no opportunity to remedy the problems itself.

In its March 21, 1985, decision, BLM interpreted 43 CFR 3162.3 differently. The crux of BLM's interpretation, which stands in direct conflict with that rendered by Exxon, is set forth below:

> That regulation at 43 CFR 3162.3 evolved from 30 CFR 221.19, which was effective until November 26, 1982. As of November 26,

> 1982, language nearly identical to that in 43 CFR 3162.3(b) was in place at 30 CFR 221.21(b). The interpretation of 43 CFR 3162.3(b) is that it applies to orders, notices, or instructions that are served upon a substitute or contractor of the designated operator or, in lieu of an officially designated operator, a contractor (or employee) of the lessee. When orders are served on such a contractor or substitute, copies are to be served on both the designated operator and the lessee(s) of record. The record shows that the notices of incidents of noncompliance were served on the officially designated operator. Therefore, the provisions of 43 CFR 3162.3(b) do not apply.

In its statement of reasons for appeal, Exxon disputes BLM's interpretation, as presented in the March 21, 1985, decision. Specifically, Exxon challenges BLM's conclusion that only in the instance when orders, notices, or instructions are served upon a substitute or contractor of the designated operator, is BLM obligated to mail a copy to the lessee and the designated operator at their address of record. Exxon interprets 43 CFR 3162.3(a) to mean that only the lessee or the lessee's designees may conduct operations on the lease. To this end, the lessee may authorize the actual conduct of operations in its behalf by designating another party as operator, and such a designation must be in the manner and form prescribed by BLM's authorized officer, i.e., by executing a "designation of operator" form and submitting it to BLM. Thus, to Exxon the regulation is clear; it allows the lessee to designate another party to carry out lease operations and when orders of the authorized officer are personally served on or delivered by ordinary mail to that person in charge of conducting operations, "a copy of the orders will be mailed to the lessee at his address of record" (Statement of Reasons at 7).

In its answer, BLM contends that "contractor or other person in charge" is not synonymous with "designated operator." Rather, the "contractor or other person in charge" is deemed the agent of the lessee "with full responsibility for acting on behalf of the lessee insofar as complying with applicable laws, regulations, the lease terms, NTL's, Onshore Oil and Gas Orders, and other orders and instructions of the authorized officer" (Answer at 2). BLM concludes that 43 CFR 3162.3 does not require BLM to serve a copy on the lessee when its designated operator is developing the lease. Thus, under BLM's interpretation, a contractor or other person may engage in the actual conduct of operations on the lease without qualifying as a designated operator under subsection (a).

[1] In its March 21, 1985, decision, BLM refers to 30 CFR 221.19, the predecessor of 43 CFR 3162.3, in concluding that 43 CFR 3162.3 does not require BLM to mail a copy of orders, notices, and instructions to the lessee of record when such is served upon the lessee's designated operator. In reaching our own conclusions about the proper interpretation of 43 CFR 3162.3, we have examined the history of that regulation, which was originally promulgated on June 2, 1942, at 30 CFR 211.19 (7 FR 4132), and which remained in effect until November 26, 1982. The text of 30 CFR 221.19 (1981), when compared with 43 CFR 3162.3, helps to elucidate what the current regulation is intended to accomplish:

§ 221.19 Designated operator (or agent).

(a) In all cases where operations on a lease are not conducted by the record owner, but are to be conducted under authority of an operating agreement, an unapproved assignment, or other arrangement, a "designation of operator" shall be submitted to the supervisor, in a manner and form approved by the supervisor, prior to commencement of operations. If the designation of operator form cannot be obtained from the lessee without undue inconvenience to the operator, the supervisor in his discretion may accept in lieu thereof a valid operating agreement approved by the Secretary. A designation of operator will be accepted as authority of operator or his local representative to fulfill the obligations of the lessee and to sign, as operator, any papers or reports required under the regulations in this part. It will rest in the discretion of the supervisor to determine how a local representative of the operator empowered to act in whole or in part in his stead shall be identified.

(b) If the designated operator shall at any time be incapacitated for duty or absent from his designated address, the operator or the lessee shall designate in writing a substitute to serve in his stead, and, in the absence of such operator or of notice of the appointment of a substitute, any employee of the lessee who is on the leased lands or the contractor or other person in charge of operations will be considered the agent of the lessee for the service of orders or notices and service in person or by ordinary mail upon any such employee, contractor, or other person will be deemed service upon the operator and the lessee. All changes of address and any termination of the operator's authority shall be immediately reported, in writing, to the supervisor or his representative. In case of such termination or of controversy between the lessee and the designated operator, the operator, if in possession of the leasehold will be required to protect the interests of the lessor.

What is clear from subsection (a) of 30 CFR 221.19 is that "[i]n all cases where operations on a lease are not conducted by the record owner * * * a 'designation of operator' shall be submitted to the supervisor * * *." See KernCo Drilling Co., 71 IBLA 53 (1983). 3/ There was an exception to that blanket formality when the "designation of operator" form could

3/ In KernCo the Board interpreted and applied 30 CFR 221.19(a). Therein, the appellants argued that because they had acted as operator of oil and gas leases under an operating agreement, they were entitled to notice from BLM that the lease had terminated, in order for them to remove equipment which they had installed on the leased premises. The Board ruled that the appellants were not entitled to notice, and that the equipment became the property of the Government in accordance with the lease terms, because appellants were not formally "designated operators" under 30 CFR 221.19(a). Only the lessee, concluded the Board, enjoys the operating rights under a Federal oil and gas lease, and since those rights are exclusive, "no one may lawfully install

not be obtained from the lessee without undue inconvenience to the operator. In that case the supervisor in his discretion could accept in lieu thereof a valid operating agreement approved by the Secretary. The regulation also indicated that execution of a designation of operator would authorize the operator or "his local representative" to fulfill the lease obligation.

Subsection (b) provided, however, that if the designated operator were incapacitated or absent from his address, that operator or the lessee was responsible for designating a substitute, and in the absence of the operator or the failure to appoint a substitute, any employee of the lessee on the lands or the contractor or other person in charge of operations would be considered the agent of the lessee for purposes of service of orders or notices and service on that person would be deemed service upon the operator and the lessee. Of critical note is that under 30 CFR 221.19(b) (1981), there was no requirement that either the designated operator or the lessee be served with a copy of a notice or order served under that subsection.

Rulemaking, published in the Federal Register on November 17, 1981, proposed a revision to 30 CFR 221.19. Redesignated as 30 CFR 221.21, the proposed regulation provided:

> § 221.21 Conduct of operations.
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> Leasehold operations shall be conducted by the lessee or its designees. The lessee may authorize the actual conduct of operations in its behalf by designating another party as operator in a manner and form acceptable to the Supervisor. Acceptance of an executed designation as authority for the designee to act for the lessee in matters relating to the conduct of lease operations does not relieve the lessee from the ultimate responsibility for compliance with applicable laws, regulations, lease terms, Onshore Oil and Gas Orders, Notices to Lessees and Operators, and the orders and instructions of the Supervisor. Any contractor or other person in charge of or conducting operations on a leasehold will be considered the agent of the lessee with full responsibility for acting on behalf of the lessee insofar as complying with applicable laws, regulations, the lease terms, Notices to Lessees and Operators, Onshore Oil and Gas Orders, and other orders and instructions of the Supervisor. The serving of orders, instructions, or notices on the contractor or other person in charge of or conducting operations on a leasehold, when delivered personally or by ordinary mail, will be deemed to be service upon the lessee. Lessees shall notify the Supervisor in writing when a designation of operator has been canceled. A designated operator cannot designate a different party as operator. [Emphasis added.]

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fn. 3 (continued)
equipment to develop Federally leased deposits unless he holds such authority by or through the lessee." 71 IBLA at 57. The Board suggested, without deciding, that "failure to comply with this regulation rendered appellants' entry upon the leasehold unlawful and their equipment subject to immediate forfeiture." 71 IBLA at 57.

A feature common to 30 CFR 221.19 (1981) and the proposed revision of 30 CFR 221.21 was that the leasehold operations were to be conducted only by the lessee or its designees. Proposed 30 CFR 221.21 retained the provision that the lessee could authorize the actual conduct of operations in its behalf by formally designating another party as operator. The phrase "operator or his local representative" was dropped. Under the proposed regulation, acceptance of the "designation of operator" form conferred "authority" upon such designee "to act for the lessee in matters relating to the conduct of lease operations," but such a designation did not relieve the lessee from the ultimate responsibility for compliance with applicable rules and regulations, including "orders and instructions of the Supervisor."

The proposed rulemaking added the requirement that "[l]essees shall notify the Supervisor in writing when a designation of operator has been canceled." Under 30 CFR 221.19(b) (1981), either the designated operator or the lessee could designate a "substitute" for the designated operator if the latter became incapacitated or was absent from his address of record. But, under the proposed rulemaking, if the lessee of record did not conduct the leasehold operations, that lessee had to designate an operator to do so. Further, only the designated operator could function as operator and could not designate a different party as operator.

Importantly, the proposed rulemaking deleted the provision which called for the designation of a substitute should the designated operator become incapacitated or be absent from his address of record. However, it substantially retained the provision which applied when the designated operator was incapacitated or absent, and a substitute had not been appointed in writing. The proposed rule provided:

> Any contractor or other person in charge of or conducting operations on a leasehold will be considered the agent of the lessee with full responsibility for acting on behalf of the lessee insofar as complying with applicable laws, regulations, the lease terms, Notices to Lessees and Operators, Onshore Oil and Gas Orders, and other orders and instructions of the Supervisor. [Emphasis added.]

The proposed rulemaking included a service provision: "The serving of orders, instructions, or notices on the contractor or other person in charge of or conducting operations on a leasehold, when delivered personally or by ordinary mail, will be deemed to be service upon the lessee." The counterpart of this service provision in 30 CFR 221.19(b) (1981) arguably applied only in the situation where the designated operator was incapacitated or absent from his address of record, and no substitute had been appointed by the designated operator or the lessee.

The final rulemaking, effective November 26, 1982, reorganized the proposed rule but did not modify the provisions just discussed. 47 FR 47759, 47768 (Oct. 27, 1982). The final rulemaking did, however, add the last sentence of 30 CFR 221.21(b) (redesignated 43 CFR 3162.3(b) 48 FR 36583 (Aug. 12, 1983)), which provides, in relation to the serving of orders, instructions, or notices on the contractor or other person: "When served in

this manner, a copy will be mailed to the lessee and the designated operator at their address of record." The final rulemaking offered the following explanation for inclusion of that requirement:

> A few comments suggested that a copy of any order, instruction, or notice specific to a lease be mailed to the lessee(s) as well as delivered to the local representative. We agree with this suggestion and have implemented it. Section 221.21 was also revised for editorial clarity and to specify that any contractor served a notice or order is the party responsible for the particular activity involved in the notice.

47 FR 47763 (Oct. 27, 1982).

This explanation is of little assistance in interpreting 43 CFR 3162.3(b). In fact, reference to the term "local representative" introduces another element of uncertainty into the analysis. That term was present in 30 CFR 221.19(a) (1981), which stated that a "designation of operator" form "will be accepted as authority of operator or his local representative to fulfill the obligations of the lessee and to sign, as operator, any papers or reports required under the regulations." (Emphasis added.) That subsection made clear that the local representative was empowered to act in whole or in part in the designated operator's stead, and to fulfill the obligations of the lessee of record. The supervisor (authorized officer) was required to exercise his discretion in determining how to identify the local representative of the designated operator. 4/

It is clear the original basis for including the provision relating to service on others constituting service on the lessee was to allow the agency, at that time, Geological Survey, the flexibility to bind the lessee with notices or orders served on the person in charge of or conducting operations on the lease site. However, the circumstances under which that provision was viable were limited to situations where the designated operator was absent or notice of a substitute had not been given. While that limitation was removed from the regulations, the service provision was substantially retained.

4/ In this connection, 30 CFR 221.2(e) (1981) defined "Designated Operator or Agent" as "[t]he local representative of the lessee or of the operator; may be the holder of operating rights under an approved operating agreement." Further, the term "Operator" was defined in the same section as "[t]he individual, partnership, firm, or corporation that has control or management of operations on the leased land or a portion thereof. The operator may be a lessee, designated agent of the lessee, or holder of rights under an approved operating agreement."

The proposed rulemaking deleted the reference to "local representative" in defining "Designated Operator or Agent," and simply defined that term as "[t]he party designated by the lessee(s) or holders of operating rights under an approved operating agreement, who is authorized to conduct operations on the leased land or a portion thereof." 46 FR 56567 (Nov. 17, 1981). No explanation is given for the deletion.

If that were the present status of the regulation, we would have no problem holding that service on Exxon was not required. Because 43 CFR 3162.3 only allows the lessee or its designees to operate on the lease and the limitation for the constructive service provision was dropped, we would assume the intent of deleting the limitation on the service provision was to broaden its scope to provide for constructive service on the lessee whenever the "contractor or other person in charge of or conducting operations on a leasehold" was served with a notice, instruction, or order.

However, by adding the last sentence regarding mailing copies to the lessee and the designated operator, BLM has created an ambiguity in the regulations. Under the wording of the regulation, one must assume that the contractor or any person conducting operations on the lease has been authorized to do so by the lessee as its designee; 5/ however, the regulation provides that even though service on that person is deemed service on the lessee, "a copy will be mailed to the lessee and the designated operator at their record address." 6/

We must find under the regulation that BLM bound itself to mail a copy of orders, instructions, or notices to the lessee and the designated operator. Clearly, in cases where the designated operator is personally served at the lease site or by "ordinary mail," sending a copy by mail to the designated operator in accordance with the last sentence of 43 CFR 3162.3 would not be necessary. The same would hold true for the lessee if it were the party served. However, in a situation such as presented in this case in which the designated operator is served, the regulation requires that a copy be mailed to the lessee. 7/

5/ We note that the provision of the regulation which relates to serving the "contractor or other person in charge of conducting operations" personally or by ordinary mail reinforces the proposition that such a person must be the lessee or its designee. If not the lessee or its designee, presumably BLM would not have an address of record such that service could be accomplished by "ordinary mail."

6/ We note the regulatory definition of "lessee" at 43 CFR 3160.0-5 provides that throughout 43 CFR Part 3160 the term "lessee" also refers to and includes the owners of approved operating rights and designated operators.

7/ We note our construction of the regulation is consistent with proposed rulemaking issued by BLM on Jan. 30, 1986. 51 FR 3882 (Jan. 30, 1986). The Department proposed to amend 43 CFR 3162.3 by removing the last two sentences of subsection (b).

The proposed rulemaking incorporates notice provisions into 43 CFR 3165.3, which provides:

"Whenever a lessee fails to comply with any provisions of the lease, the regulations in this part, applicable orders or notices, or any other appropriate orders of the authorized officer, written notice shall be given the lessee to remedy any defaults or violations.

"(a) Notice. Written orders or a notice of violation or proposed penalty shall be issued and served by personal service by an authorized officer or by certified mail. Service shall be deemed to occur when received or 5 business days after the date it is mailed, whichever is earlier. Any person may designate a representative to receive any notice on his/her behalf.

Exxon points out that several of the comments on the proposed Federal Oil and Gas Royalty Management Act (FOGRMA) regulations published in the Federal Register on Sept. 16, 1983, suggested that violation notices also be sent to the lessee of record if the lessee is different from the operator. In the preamble to the final rulemaking, published in the Federal Register on Sept. 21, 1984, BLM stated that it did not incorporate the suggestion because "other sections of the existing regulations require service upon the lessee of record." 49 FR 37356, 37362 (Sept. 21, 1984). Exxon points out, correctly, that the only "existing regulation" which requires service upon the lessee of record is 43 CFR 3162.3. Exxon argues that "BLM cannot have it both ways; it cannot assert on one day that the regulation requires notices to be sent to the lessee of record then on another day apply the regulation in a manner which denies the lessee of record its right to receive notices" (Statement of Reasons at 16).

The Designation of Operator form (9-1123) executed by Exxon and Devon Energy Corporation and submitted to BLM designated Catamount as their "operator and local agent, with full authority to act in [their] behalf in complying with the terms of the lease and regulations applicable thereto and on whom the supervisor or his representative may serve written or oral instructions in securing compliance with the Operating Regulations * * *." We note, however, that form 9-1123 was devised in 1957 and reflected 30 CFR 221.19, the regulation then in effect. Form 9-1123 does not relieve BLM of its obligation to mail a copy of any orders, instructions, or notices to the lessee of record, as required by 43 CFR 3162.3. A duly promulgated regulation has the force and effect of law, and is binding upon all Department officials, including this Board and the Secretary, and may not be waived. Joseph J. C. Paine, 83 IBLA 145 (1984), and cases cited therein.

[2] BLM imposed an assessment of $ 250 per day for noncompliance with 43 CFR 3162.1 from September 1 through September 19, 1983, for a total of $ 4,750. This assessment was imposed pursuant to 43 CFR 3163.3, "$ 250.00 per day * * * for the 19 days you failed to achieve compliance." The letter notifying Catamount of the assessment failed to specify the subsection of 43 CFR 3163.3 pursuant to which the assessment was being imposed, but subsection (a) of that regulation is the obvious one, based upon the wording of BLM's assessment letter to Catamount. That regulation provides:

> Certain instances of noncompliance result in loss or damage to the lessor, the amount of which is difficult or impracticable

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fn. 7 (continued)
If no designation pertaining to the lease has been filed, any person authorized by the lessee to submit reports, notices, affidavits, records, or other information required by regulations in this part or who is authorized by the lessee to conduct or supervise operations subject to regulations in this part may receive the notices. Notice of a major violation may also be served on any operator's representative as previously described. A copy of all orders, notices, or instructions served on any contractor shall also be mailed to the lessee or the lessee's designated representative as described above. Any notice involving a civil penalty shall be mailed to the lessee of record." (Emphasis added.)

> to ascertain. Except where actual losses or damages can be ascertained in an amount larger than that set forth below, the following amounts shall be deemed to cover loss or damage to the lessor from specific instances of noncompliance.
>
> (a) For failure to comply with a written order or instruction of the authorized officer, $ 250 if compliance is not obtained within the time specified.

43 CFR 3163.3(a) (1984).

In its March 21, 1985, decision, responding to Exxon's request for a technical and procedural review of the assessment, BLM explained that the Director of BLM had decided to place a "cap" on the amount of assessments for noncompliance imposed for violations found on or after January 4, 1985, and was considering making the "cap" retroactive. BLM stated that if the Director made the "cap" retroactive, Exxon could request a reduction of the $ 4,750.

The version of 43 CFR 3163.3 in effect when BLM imposed the assessment of $ 4,750 against Catamount provided that as to incidents of noncompliance described in specified paragraphs of that regulation, including paragraph (a), the specified amount for loss or damage "shall be applicable to each successive day of the noncompliance." Thus, BLM imposed an assessment of $ 250 for each of the 19 days during which Catamount was found to be in violation of 43 CFR 3162.1. However, 43 CFR 3163.3 was amended, effective October 22, 1984, deleting the provision for continuing assessment of liquidated damages for each day of noncompliance. See 49 FR 37361, 37365 (Sept. 21, 1984). 8/ Thus, at present, BLM may only assess a one-time liquidated damages charge of $ 250 for each incident of noncompliance arising from failure to comply with a written order of an authorized officer. See 49 FR 37361 (Sept. 21, 1984). This Board ruled in Willard Pease Oil & Gas Co., 89 IBLA 236 (1985), that in the absence of any intervening rights which would be adversely affected or countervailing public policy considerations, we would apply the amended 43 CFR 3163.3 to benefit an appellant against whom an assessment for noncompliance had been rendered.

Determination that 43 CFR 3162.3 required that BLM mail a copy to Exxon of the notices served on Catamount in this case and that the proper assessment in this case is $ 250 does not resolve Exxon's appeal. Exxon claims that BLM's failure to comply with 43 CFR 3162.3 exonerates it from any liability for the assessment in this case. 9/ BLM's decision held

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8/ We note that the revised regulations under 43 CFR Part 3160 published Sept. 21, 1984, were suspended, in part, by notice published in the Federal Register on Mar. 22, 1985. 50 FR 11517-18. See BLM Instruction Memorandum Nos. 84-594, Change 4, and 85-384, dated Apr. 16, 1985. However, the suspension did not affect the provisions of 43 CFR 3163.3(a) or the elimination of the successive daily assessments for noncompliance.

9/ Exxon admits that, as lessee, it is liable for compliance with lease obligations and it states that it has fulfilled those obligations by undertaking the work required by BLM's directives.

otherwise. The regulation analyzed in this case requires that copies of notices, instructions, or orders be mailed to the lessee. Neither that regulation nor any other regulation, however, specifies what the result of failure to comply with that regulation should be.

The regulation under which the assessment was made, 43 CFR 3163.3(a), provides for an assessment of $ 250 for failure to comply with a written order or instruction "if compliance is not obtained within the time specified." Herein, Catamount received notice by letter dated July 12, 1983, to take certain actions on the leases. The time for compliance was specified as September 1, 1983. When the work was not completed on that date, Catamount subsequently received notice of the assessment.

Pursuant to the assessment regulation, the person receiving the directive knows that failure to comply within the specified period will result in an assessment. Therefore, what BLM is most concerned with is timely compliance; assessment is secondary. Failure to provide the lessee with a copy of the directive potentially can thwart the purpose of the regulation. Exxon explained:

> Had the BLM sent to Exxon a copy of the July 12, 1983 notice, as required by 43 CFR 3162.3, then Exxon would have had an opportunity to persuade Catamount to remedy the problems on the Exxon leases. Had Catamount not responded, then Exxon would have had the opportunity itself to remedy the problems. Had BLM sent to Exxon a copy of the October 14, 1983 letter imposing the assessment, then Exxon would have had an opportunity within the prescribed ten-day period to request a Technical and Procedural Review of the assessment.

(Statement of Reasons at 9).

BLM's failure to provide Exxon with copies of the directives prevented Exxon from having the opportunity to comply with them and, thus, avoid any assessment in this case. Under the circumstances, we must reverse BLM's decision that Exxon is responsible for the assessment of noncompliance in this case.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the March 21, 1985, decision of the Wyoming State Office is reversed.

Bruce R. Harris
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Anita Vogt
Administrative Judge
Alternate Member